Fountain Court

Proof of Foreign Law after *Brownlie*

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Introduction

It has long been the rule that foreign law is treated by the English Court as a question of fact which must be pleaded and proved. Proof of foreign law has traditionally been by way of expert evidence. As long ago as the Sussex Peerage Case(1844) 11 Cl & Fin 85, Lord Brougham said that "*the judge has not organs to know and to deal with the text of the foreign law, and therefore requires the assistance of a lawyer who knows how to interpret it*".

That orthodoxy, and Lord Brougham's restricted view of an English judge's ability to interpret foreign law without expert evidence, has been questioned by Lord Leggatt in Brownlie v FS Cairo (Nile Plaza) LLC [2021] 3 WLR 1011. When addressing the issue of how the Court should approach questions governed by foreign law where there is no adequate proof of that foreign law before the English Court, Lord Leggatt also turned his focus on the means by which litigants can prove foreign law.

At paragraph 148, Lord Leggatt said:

"The old notion that foreign legal materials can only ever be brought before the court as part of the evidence of an expert witness is outdated. Whether the court will require evidence from an expert witness should depend on the nature of the issue and of the relevant foreign law. In an age when so much information is readily available through the internet, there may be no need to consult a foreign lawyer in order to find the text of a relevant foreign law. On some occasions the text may require skilled exegesis of a kind which only a lawyer expert in the foreign system of law can provide. But in other cases it may be sufficient to know what the text says. If, for example, the question is whether a spouse has a right to claim

AUTHORS

Giles Wheeler KC
Call Date: 1998
Silk Date: 2020
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damages for bereavement under the applicable foreign law, producing a copy of the relevant foreign legislation (with, if necessary, an English translation) is a much more secure basis for a finding than presuming that the foreign law is the same as the English law. Of course, a judge needs to be alert to whether the text relied on is current. But even if that cannot be guaranteed, the presumption of continuity may be a more reliable foundation in the absence of contrary evidence than the presumption of similarity."

Although Lord Leggatt's remarks were obiter, the most-recent edition of the Commercial Court Guide, which was published earlier this year, refers specifically to Lord Leggatt's speech (at section H3 of the Guide), and encourages litigants to take advantage of the flexibility available to the Court when considering how to approach proof of foreign law. The Guide presents a variety of alternatives to the traditional approach of oral expert evidence. Those alternatives mean that thought must now be given to the most appropriate means for addressing proof of foreign law in any particular case.
This article considers the options now available to parties, and how parties (and the Court) can determine which is the most appropriate in any particular case.

The decision in Brownlie

Brownlie is a well-known and tragic case which has been the subject of extensive commentary. The claim arises out of a serious road accident in Egypt in which Professor Sir Ian Brownlie, the well-known Oxford Professor of Public International Law, was killed, along with his daughter; his wife and two of his grandchildren were seriously injured.

The accident occurred on an excursion arranged through the Four Seasons hotel in Cairo at which the Brownlies had been staying. Lady Brownlie had booked the excursion by telephone from London before the start of the family's visit to Egypt. Her claim was therefore brought against the hotel in both contract and tort, both on her own behalf and on behalf of Professor Brownlie's estate, and both on the basis that the hotel was vicariously liable for its employee as the driver responsible for the accident and directly liable for its own wrongdoing. Some complications to the proceedings have arisen because the claim was originally brought against the wrong corporate entity, necessitating an application to substitute the correct defendant for the company against which the claim was originally brought.

Lady Brownlie's claim has already given rise to two appeals to the Supreme Court, both of which were concerned with whether the English court has jurisdiction to hear the claim. The decisions of the Supreme Court in Brownlie v Four Seasons Holdings Inc [2018] 1 WLR 192 (which involved the original defendant) and Brownlie v FS Cairo (Nile Plaza) LLC ("Brownlie 2") (involving the substituted, correct, defendant) have been the subject of much comment focusing on the application of the "tort gateway" for permitting service out of the jurisdiction under CPR PD 6B, 3.1(9). However, in Brownlie 2 Lord Leggatt (who dissented on the "tort gateway" issue) also addressed how the Court should approach questions of foreign law where adequate proof of that law is not before the Court. On that issue, Lord Leggatt's speech represented the Supreme Court's unanimous views.

In the course of addressing this point, Lord Leggatt identified and distinguished two different rules, which are long-established in the authorities, but which have often been conflated and confused:

- The "*default rule*", which is the rule that the Court will apply English law if foreign law is not pleaded. If, for example, a contract is expressly governed by French law, but no party pleads any French law, the Court will

instead apply English law. This rule depends on neither party pleading any foreign law and therefore effectively applies a *de facto* agreement between the parties to resolve their dispute by reference to English law.

- The "*presumption of similarity*", which applies when a foreign law is relied on but is for some reason not proved by the evidence before the Court. There is (or may be) then a rebuttable presumption that the foreign law is the same as English law. The presumption can be used to fill gaps in expert evidence, as well as when there was no evidence of foreign law at all.

Having addressed the presumption of similarity, Lord Leggatt went on to say (at paragraph 148 of his speech as quoted above) that it should not be assumed that the only alternative to the presumption is to tender expert evidence in foreign law. However, while it may be sufficient, for example, simply to put evidence of a relevant foreign statute before the Court and advance argument based on that, it may also be necessary to have recourse to the presumption of similarity in a gap filling role. For example, if the evidence before the Court is restricted to evidence of the wording of the relevant foreign statute, the presumption may be applied to address the absence of any evidence as to the foreign principles of statutory interpretation.

The alternative approaches

The Commercial Court Guide refers specifically to paragraph 148 of Lord Leggatt's speech and encourages parties to utilise the flexibility that he identified. In doing so, the Guide presents a series of non-exhaustive options:

- Having full expert reports but only oral evidence if the experts cannot agree.

- Exchanging expert reports and then dealing with matters by way of submissions rather than cross-examination of the experts.

- Limiting the expert evidence to identifying the relevant sources of law and any applicable principles of interpretation, and then dealing with everything else by submission.

- Not having expert evidence at all, identifying the relevant sources of foreign law by agreement or judicial notice, and dealing with all of the issues by way of submission.

In identifying those options, the Guide poses the question as to when each might be appropriate and how the parties ought to decide between them. However, the Guide does not give real guidance on how the Court will choose between the different options available to it. Nor is there yet much guidance from authorities on the point, although that is perhaps unsurprising given that these developments remain relatively recent and also because decisions on the appropriate approach to be adopted are likely to be taken at Case Management Conferences and Pre-Trial Reviews which are rarely reported.

Some guidance can be drawn from the recent decision of Calver J at the Pre-Trial Review in Suppipat v Narongdej [2022] EWHC 1806, for which, unusually, a judgment is available. That case gives rise to issues governed by Singaporean, Thai, and Chinese law. Expert evidence had been exchanged by the parties on the issues governed by each of those laws. However, at the PTR, Calver J directed that oral evidence from the experts on Singaporean law should be dispensed with and that the parties should deal with the issue to which the reports had been directed by way of submission. Two reasons appear to have driven that decision: first, the issue in question was a relatively narrow one;

question was a relatively narrow one; secondly, Singaporean law is a common law system relatively similar to English law which the Court would not require expert explanation to understand once the relevant authorities had been identified to it. Issues of Thai and Chinese law were to be dealt with by oral expert evidence in the conventional manner.

What should parties consider and when?

There are a number of matters that litigants dealing with issues of foreign law are likely to need to address:

Is the issue of foreign law to be addressed at an interim hearing or at trial? At an interim hearing, the Court is less likely than at trial to be reaching a final decision on a question of foreign law and more likely to be determining whether a particular point is arguable than finally deciding it. In that context, the Court may be more willing to proceed with less-extensive expert evidence, or no expert evidence at all. For example, in Chep Equipment Pooling v ITS Limited [2022] EWHC 741, Richard Salter QC (sitting as a Deputy Judge) said that it was sufficient when hearing a jurisdiction challenge to apply the presumption that the principles of interpretation of jurisdiction clauses under Belgian law were the same as under English law, rather than having expert evidence before the Court on that issue.

What is the significance of the issue of foreign law to the litigation as a whole? An issue of foreign law that is of only minor significance to the proceedings as a whole and unlikely to be determinative will be more likely to justify a pared down approach to proof than one which is of critical importance. The flexibility available to the Court will enable the parties to avoid bearing the full cost of oral expert evidence needing to be given simply because a minor dispute on a point of foreign law has arisen on the pleadings.

What is the nature of the parties' dispute as to the relevant foreign law? Even if foreign law is critically important to the determination of a dispute, the nature of the issues between the parties and how they are likely to be argued will be relevant to the most appropriate approach to proof of the relevant law. For example, the interpretation of a single legislative provision may be better served by more limited evidence as to the principles of interpretation that are relevant; whereas a dispute over how conflicting legal principles inter-relate in particular factual circumstances may be much more likely to require the cross examination of experts.

What is the nature of the relevant foreign law? Whether the foreign law in dispute is statutory or case law, and whether it is a common law or civil law system are both likely to be relevant factors influencing the Court's approach. Where, as in Suppipat v Narongdej, the Court is dealing with a foreign common law system, it is less likely to require the help of expert cross examination. By contrast, if the Court is having to apply foreign legal principles that have no equivalent in English law, the cross examination of experts is more likely to be necessary.

The question of how issues of foreign law are to be addressed ought to be raised with the Court at the Case Management Conference. It will be important to have thought through how each of the issues of foreign law ought most appropriately to be approached and why, with a view to persuading the Court to make the necessary directions. If it is proposed to address the foreign law without expert evidence, or if the expert evidence is to be restricted in its nature, a direction to that effect should be sought at the CMC to indicate that the Court has approved such an approach (even if permission for expert evidence is not needed). If the expert evidence is to be restricted, the Court will need to make a direction identifying what should (and should not) be addressed in the expert evidence.

Tactical considerations can come into play: fuller expert evidence may be more important to the way one party puts its case than the other party, and parties may seek to limit (or expand) the role of the experts in a way that suits their own case. There will no longer be an assumption that every point will be dealt with by way of an expert report, but the Court will need to be persuaded to adopt a particular approach. Clear reasons will need to be given to the Court to justify how a party wants the issue to be dealt with, which in turn requires a clear understanding of the relevant foreign law, the aspects of it that are in dispute, and how the expert evidence will assist the Court.

In some instances, some decisions can sensibly be delayed until a Pre-Trial Review. For example, a direction could be given at the CMC to exchange expert reports but with the way those reports are used at trial determined only at the PTR in the light of the nature and extent of the differences between the experts. However, it will never be possible to postpone every aspect of how issues of foreign law are to be addressed until the PTR which will mean that important decisions will always need to be taken at the CMC.

The further away the Court moves from requiring oral expert evidence on issues of foreign law, the more likely it is that gaps may emerge in the information available to the Court when deciding an issue of foreign law. If the expert evidence is to be limited to identifying the relevant sources of law, and any applicable principles of interpretation, with everything else dealt with by submission, there is inevitably a risk that a point will emerge at trial which properly cannot be dealt with by submission alone, but which is not the subject expert evidence. In those circumstances, recourse to the presumption of similarity may be necessary to avoid an evidential vacuum. There are obviously risks and uncertainty in such a scenario. While the Court may be more likely to apply the presumption if it is needed as a direct result of the Court's own case management directions, there is little authority on the point and no guarantee that the Court at trial will regard the application of the presumption as appropriate. These potential difficulties serve to emphasise the importance of working out in advance exactly how the issues of foreign law are to be addressed.

Conclusion

The Commercial Court is keen to encourage a more flexible approach to addressing issues governed by foreign law. It remains to be seen how the new approach will work in practice, but it has the potential to streamline cases which raise such issues. However, the new flexibility will work only if parties give full and proper consideration at an early stage of the proceedings to what issues are governed by foreign law, and how they should be addressed.

For more information, or if you have a specific enquiry, please contact our clerking team.